BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOBA J. GRISSOM	)	
Claimant	)	
	)	
VS.	)	
	)	
MID CONTINENT CABINETRY, INC.	)	
Respondent	)	Docket No. **1,046,678**
	)	
AND	)	
	)	
TRAVELERS INDEMNITY CO. OF AMER.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the November 12, 2009 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) found that claimant's failure to use the face shield was not a willful failure to use a guard or protection. The ALJ further found that claimant's accidental injury arose out of and in the course of employment.

Respondent requests review of whether claimant willfully failed to use a reasonable, proper guard and protection voluntarily furnished to him by the respondent.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a pump technician for Mid Continent Cabinetry. On July 9, 2009, claimant was using a high pressure hose to transfer a top coat lacquer when the hose came out of the barrel knocking his respirator off and spraying the lacquer in his mouth and eyes as well as on his chest. He testified that the lacquer had a mixture of formaldehyde and acid. Claimant suffered a rash after coming in contact with the lacquer. He tried to wash his eyes and mouth at the wash station but it did not work properly.

Claimant testified he began to experience headaches, memory issues and problems with his throat such as dryness and loss of voice.

All pump room technicians are provided safety equipment that they are required to wear. The safety equipment includes safety glasses, respirator, face shield, full-body nylon suit worn over the worker's clothing, gloves and an apron. At the time of the accident, the only proper protective equipment that claimant was not wearing was a face shield.

> Q. Was there any piece of safety equipment that you were given before that incident that you weren't wearing at the time of that incident?
>
> A. Yeah, it was a shield, but it had, from a previous spill it had lacquer all over the front of it to where you couldn't see. And I had to ask a request to replace that equipment that previous year.[1]

Claimant testified that he had problems with his equipment and had notified his supervisor, Jay Pennick.

> Q. Why didn't you get somebody to fix that, or why didn't you get that corrected?
>
> A. I have, through the whole year, I have asked to replace solvent gloves and shields and they said they would. Kevin Chamberlain, which is our head maintenance guy, was supposed to provide that to us, but they were more worried about Building 1.
>
> Q. So you had asked this particular safety mask to be replaced before July 9, 2009?
>
> A. Yes.
>
> Q. Was it in such a condition on that date that you had difficulty seeing through it?
>
> A. Yes.[2]

Claimant further testified that he had performed his work duties without the face shield for more than a month and that his supervisor had witnessed it. Claimant had told his supervisor that he needed new gloves and that the shield needed to be replaced.

The respondent's safety specialist, Sherril Garza, testified that safety equipment was kept in her office and employees could simply come pick up items as needed. However, claimant's supervisor did not testify.

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[1] P.H. Trans. at 11-12.

[2] *Id.* at 15.

It is undisputed that claimant was not wearing his face shield when the hose came loose spraying him in the face. This was exactly the type of incident that the face shield would provide protection against.

K.S.A. 2009 Supp. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in *Bersch*[3] and the Court of Appeals in a much more recent decision in *Carter*[4] have defined "willful" to necessarily include:

> . . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.' *Carter* at 85.

The mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.[5]

In this instance there is the admission that claimant was not wearing his face shield when the accident occurred. And claimant knew he was required to wear a face shield. But claimant testified that he had told his supervisor that he needed a new face shield before the accident had happened. Claimant's actions may well have been careless and negligent but the evidence does not rise to the level that his actions were a deliberate intention to cause the injury.

Moreover, the foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

> **Failure of employee to use safety guards provided by employer.** The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

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[3] *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

[4] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[5] *Thorn v. Zinc, Co.*, 106 Kan. 73, 186 Pac. 972 (1920).

The administrative regulation promulgated to implement the requirements K.S.A. 44-501(d) mandates that when safety rules are generally disregarded by employees and not rigidly enforced by the employer, then violation of the rules will not prejudice an injured employee's right to compensation. There was simply no testimony to refute claimant's contention that his supervisor had witnessed him working without the face shield for more than a month which would indicate that the safety rules were disregarded and not rigidly enforced. Again, the supervisor did not testify.

Based upon the record compiled to date this Board member affirms the ALJ's preliminary Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated November 12, 2009, is affirmed.

IT IS SO ORDERED.

Dated this 26th day of February 2010.

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DAVID A. SHUFELT
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Sylvia B. Penner, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[6] K.S.A. 44-534a.

[7] K.S.A. 2009 Supp. 44-555c(k).